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Supreme Court of the United States.

OCTOBER TERM, 1969.

No. 349.

SALVATO J. SILVERIO,
Petitioner,
v.
MUNICIPAL COURT OF THE CITY OF BOSTON AND CITY OF MEDFORD,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

BRIEF FOR RESPONDENT CITY OF MEDFORD, MASSACHUSETTS, IN OPPOSITION.

The City of Medford opposes the issuance of a writ of certiorari to review a judgment of the Supreme Judicial Court of Massachusetts.

Opinion Below.

The opinion of the Supreme Judicial Court, reported at 1969 Mass. Adv. Sh. 691 and 247 N.E. 2d 379, is printed

as Appendix A (A. 22)[1] of the petition. The opinion was originally dated April 10, 1969, but, after a request for rehearing, it was modified on April 18, 1969. The request for a rehearing was denied on April 18, 1969.

Questions Presented.

1. Should this Court exercise its discretion by granting a petition for writ of certiorari to the Supreme Judicial Court of Massachusetts on the record of this case?

2. Would a hearing of this case on the merits provide a valuable precedent?

Statement.

This petition for the issuance of a discretionary writ arises out of a Civil Service matter in the City of Medford, Commonwealth of Massachusetts. The matter was heard originally before the Appointing Authority of the City of Medford, the City Manager (R. 17), and his decision removing the police officer was appealed to the Civil Service Commission. A hearing officer heard the matter *de novo,* and upon his report (R. 20) to the Commission it upheld the decision of the Appointing Authority (R. 24). The employee then asked for a review (A. 34) by the Municipal Court of the City of Boston. This review included some fresh evidence in minor part, but chiefly concerned itself with the Civil Service record. The decision on review upheld the Civil Service Commission. The employee then,

[1] The letter "R" followed by a number is a reference to pages in the printed record in the Supreme Judicial Court. The letters "A," "B," "C," and "D" followed by numbers refer to appendices to the current petition. The letter "P" followed by a number refers to pages in the said petition.

naming the Municipal Court of the City of Boston as the respondent, filed a petition for a writ of certiorari with the Supreme Judicial Court of Massachusetts which issued an opinion and judgment denying the petition (A. 22). The City of Medford, which has a real interest in the outcome of this petition, participated in all stages of the proceedings.

This matter began at a routine level of departmental inquiry or administrative proceeding. A police officer (petitioner) was requested in writing to report to his superior officer (R. 7). When he came to the police station in response to this request he had with him a stenographer and a lawyer (R. 10) and, apparently, the undisclosed knowledge that three fellow officers were under indictment for car thefts, and that he had been to the Grand Jury room but was not under indictment (R. 8).

The petitioner's stenographer was excused from the departmental inquiry, but his attorney was allowed to remain, presumably on the condition that he would say nothing (R. 10). The employee-police officer was advised by the Acting Chief of the Police Department that this was a departmental inquiry, not a criminal proceeding, the purpose of which was to find out what he could tell his superior officer about "whether things have gone on in this city which you should have reported" (R. 10).

The petitioner admitted receiving his departmental Rule Book (Return, p. 11), in response to a question from the Acting Chief. He was then asked if he knew a William McGovern, and he refused to answer. (The Civil Service hearing officer inferred that the said McGovern was in the auto-theft ring, R. 22.)

The question about the Rule Book was the last question the officer answered, except one (R. 14) when he and his counsel collaborated on an answer and non-answer.

The approximately twenty-two questions which followed,[2] he continually refused to answer (R. 10-15). They had to do with the application of portions of the City of Medford Police Rules (R. 22), sections 16, 92 and 93. These rules generally establish the requirement that a member of the said Police Department must report all information which might be pertinent to the conduct of the affairs of the Department and its investigation of crime.

None of the questions asked of him called for an answer repeating his testimony before the Grand Jury. The questioner carefully avoided any confrontation with a problem of Grand Jury secrecy, if any there be so far as a witness is concerned, by obviously limiting the scope of the questioning solely to the conduct of the officer. He, the officer, nevertheless refused to say whether or not he had been summoned to appear before the Grand Jury, or whether he reported to or entered the Grand Jury room. He refused to say whether or not he was sworn as a witness or whether he testified or refused to testify in the Grand Jury room.

On each occasion counsel for the petitioner advised the petitioner to remain mute, and it was stated that he claimed a privilege to do so because of some instruction given him by some person, not identified, relative to the secrecy of the Grand Jury (R. 13). No privilege against self-incrimination was claimed.

This is the basic situation which led to the discharge of the police officer (R. 18-20), for conduct unbecoming a police officer and for insubordination.

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[2] The questions have been printed in various portions of the record before this Court. The complete series are to be found in the reservation and report presented to the Supreme Judicial Court, herein called the "Record," and referred to by letter "R" followed by a number.

Comment on the Petitioner's "Questions Presented."

With regard to the first question presented by the petitioner (P. 2), it should be pointed out that the questions asked the police officer did not relate to his testimony but to his conduct, and the distinction was noted by the Supreme Judicial Court of the Commonwealth of Massachusetts (A. 26, l. 5).

The second part of the petitioner's first question is similarly misleading in that it contains a matter not in the record; namely, the state of mind of the attorney representing the petitioner and, furthermore, is misleading in that nowhere does it appear in the record with certainty that the petitioner relied on his attorney in assuming his position of not answering. Page 13 of the record states that the witness had been instructed, by whom it does not say, not to discuss any Grand Jury questions with anyone, including his counsel. Under these circumstances, it is not at all clear from whom he got such advice. It could have been from characters who have no connection whatsoever with the Court and not his counsel.

Question No. 2 is misleading as stated, in that it would seem to imply that the reason for discharge was based solely on the refusal to disclose whether or not a privilege against self-incrimination, in the Grand Jury proceeding, had been claimed by the police officer.

Question No. 3 is an interesting one, but moot in that there is no evidence of a claim of the privilege against self-incrimination in the case. The nearest the petitioner came to making a claim of the privilege was by reference in his original pleadings which are not evidence (R. 4).

In regard to question No. 4, appearing on page 2 of the petition, there was no claim of First Amendment rights at all anywhere in the record. The police officer stood mute (R. 11).

Question No. 5 assumes that the Fourteenth Amendment was claimed. It was not, and no timely claim of vagueness was raised (P. 26).

Argument.

This Court, in its Rules, has stated that it will exercise its discretion by ordering a writ to issue after a petition for a writ of certiorari has been made only where there are special and important reasons therefor. Rules of the Supreme Court of the United States, Rule 19, p. [illegible].

In the mixed bag of "Record," and "Non-record" material submitted in the within petition, it may be somewhat difficult for the Court to sort out the record in making its decision. However, an examination of the printed record in the Supreme Judicial Court and its opinion based thereon, and its elimination of certain parts of the earlier printed record as being specifically not a part of the record (A. 30), leave clear an opportunity for discussion. Parenthetically it should be noted that there is nothing claimed in this Court relative to a failure to grant a rehearing, so that detail may be eliminated. It is submitted this will leave for the consideration of this Court a record composed of the following:

1. The printed record accompanying this petition.
2. The decision made a part of this petition.
3. The petition.

I. The Record Shows No Apparent Error of Law.

a. The extent of secrecy of Grand Jury proceedings required would be a matter of local determination and generally would be its determination as to what is contempt.

Such matters are commonly left to the local courts by this tribunal and the local decision is regarded as conclusive.

> *Johnson* v. *New Jersey,* 384 U.S. 719.
> *Patterson* v. *Colorado, ex rel. Attorney General of the State of Colorado,* 205 U.S. 454.

In any event the law is clear in Massachusetts that no witness is sworn to secrecy and no violation punishable by contempt is possible, and no cases support any other position (A. 25-26).

b. Reliance on such a non-existent reason, *i.e.,* fear of violating the secrecy of the Grand Jury room, cannot support a claim of the privilege against self-incrimination. There must be potentially a genuine criminal violation somewhere in the wings.

> See *Uniformed Sanitation Men Assn. Inc.* v. *Commissioner of Sanitation of the City of New York,* 392 U.S. 280, 284 (1967).

c. The record shows that the police officer's refusal to answer was a deliberate, calculated act. It was a withholding from appropriate authority of information considered pertinent, withheld by a police officer who had long training in what his duties required.

> See *Uniformed Sanitation Men Assn. Inc.* v. *Commissioner of Sanitation of the City of New York,* 392 U.S. 280, 285 (1967).
> *State of New Jersey* v. *Naglee,* 44 N.J. 209, 207 A. 2d 689, 695.

d. Nothing in the record shows an invasion of constitutional rights, directly or indirectly.

II. The Case does Not Lend itself to an Impressive Precedent.

The right of a police officer to have counsel at a departmental inquiry, or the right of a police officer to remain silent when queried by his superior officer in the absence of any threat or coercion merely because he imagines he is in trouble, or the extent of the right to rely on the competence of counsel, might have had some universality or novelty that would merit settlement.

Unfortunately in this case, the permissible inferences are so numerous and the facts so obscured, that no clear-cut reading is entirely possible. For example, the silence of the police officer is consistent with advice to avoid claiming the privilege of self-incrimination rather than relying on the advice of counsel as to the secrecy of the Grand Jury; in point of fact it is not clear that he relied on counsel *at all* for advice. He may have used counsel just for support, since the advice according to the record may have come from others; the alleged irrelevancy or vagueness of the questions vis-á-vis the rules and regulations was never challenged, so that any chance of resolving an ambiguity on the scene was lost. The ambivalent attitude of counsel as being merely a spectator, and then a legal advisor, would seemingly avoid a judicial analysis of his role in this matter (R. 9).

Conclusion.

The respondent City of Medford respectfully submits that the petition for a writ of certiorari to the Supreme Judicial Court in Massachusetts should be denied for the reason that there is no error apparent on the record, and further, because there is nothing a hearing on the merits

in this case would present as a novel issue for the guidance of municipalities throughout the country in a clear-cut, useful way.

Accordingly, inasmuch as this is addressed to the Court's discretion, it is respectfully submitted the discretion should be exercised by a denial.

Respectfully submitted,

C. KEITH HURLEY,

MARK E. GALLAGHER.